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NON-JOINDER AND MISJOINDER OF PARTIES IN
COMMON-LAW ACTIONS

BY HENRY CRAIG JONES* AND LEO CARLIN**

INTRODUCTION

The common-law difficulties as to the joinder of parties in actions at law arose chiefly from two causes: (1) The common-law conceptions as to the nature of the substantive rights of persons having joint interests and under joint liabilities, and of persons having several interests and under several liabilities. (2) The common-law conception of a cause of action as an entity, and the resulting requirement that the judgment must be *in solido*. The rigid concept of the common law is that there may be only one judgment, and such judgment must be entered in favor of all the plaintiffs and against all the defendants, thus differing from the more liberal equity practice, where decrees may be entered for less or against less than all the parties, and different decrees may be entered in favor of or against different parties. The rule as to plaintiffs is very well expressed by Eyre, C. J., in *Scott v. Godwin*,¹ as follows:

“Many plaintiffs can have but one right, having but one interest and one cause of action; which ought to be, and is indivisible, admitting of but one satisfaction.”

The only substantial exceptions to the rule at law that it is necessary for a single judgment to be entered for all the plaintiffs as a group against all the defendants as a group, are found (1) in actions against joint tortfeasors and (2) in contract actions where a defendant has a personal defense.

NON-JOINDER OF PLAINTIFFS IN ACTIONS EX CONTRACTU.

In contract actions, at common law, all joint promisees must join.

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¹ B. & P. 71 (1797).

One ought not to be allowed to sue alone for the whole of that of which he is entitled only to a part.² Several promisees must sue separately.³ There can not be joint and several promisees.⁴ Under the rule that all persons having a joint interest in the recovery must join as plaintiffs, the non-joinder of a necessary plaintiff is fatal to the action.⁵ If such defect be apparent on the face of the declaration, it is ground for a demurrer, a motion in arrest of judgment, or a writ of error, because the declaration does not disclose a cause of action in favor of the plaintiff or plaintiffs suing, but only a cause of action in favor of a different group of persons.⁶

In West Virginia, the question appears first to have arisen in *The Phoenix Assurance Co. v. Fristoe*,⁷ where the plaintiff sued alone on a promise to pay money made by the defendant for the joint benefit of plaintiff insurance company and another insurance company. It was held that the plaintiff could not sue alone. Quoting from Tucker's Commentaries,⁸ the court says:

"When the contract is made with several, whether it were under seal or by parol, if their legal interest were joint, they must all, if living, join in an action in form *ex contractu*, for the breach of it."

It does not appear whether the non-joinder was apparent on the face of the declaration, but seemingly it was not. The defendant had pleaded *non assumpsit*. On proof of the fact that the promise was made jointly to the two promisees, the lower court, being of opinion that the evidence failed to sustain the declaration, on plaintiff's refusal to take a non-suit, excluded the evidence and directed a verdict for the defendant. This judgment was affirmed.

It will be noted that the course pursued by the trial court in this case is in accord with the regular West Virginia practice. In many jurisdictions, under such circumstances, the plaintiff would have been peremptorily non-suited.⁹ In West Virginia, however, it has been decided that a plaintiff can not be made to suffer an involuntary non-suit at the trial.¹⁰ Hence the uniform practice has been, when the evidence is insufficient, to sustain a motion to exclude the

² DICEY, PARTIES, Rule 13.

³ *Idem*, Rule 10.

⁴ *Idem*, Rule 14.

⁵ *Idem*, Rule 115.

⁶ Willoughby v. Willoughby, 5 N. H. 244 (1830); DICEY, PARTIES, 502; AMES, CASES ON PLEADING, ed. 1905, 138; 15 ENCYC. PL. & PRAC. 564.

⁷ 53 W. Va. 361, 44 S. E. 253 (1903).

⁸ Vol. 2, ed. 1837, 210.

⁹ 3 BOUVIER'S LAW DICTIONARY, 2362; 4 MINOR, INSTITUTES, 782.

¹⁰ Carrico v. West Virginia Cent. etc. Ry. Co., 35 W. Va. 389, 394, 14 S. E. 12 (1891); Marcus v. McClure, 63 W. Va. 215, 59 S. E. 1055 (1907). See 4 MINOR, INSTITUTES, 782.

evidence and then, upon plaintiff's refusal to take a non-suit, to direct a verdict for the defendant.

The question next arose in *Sandusky v. Oil Company*.¹¹ To support the declaration, which contained only the common counts, the plaintiff, who sued alone, offered in evidence an oil lease between the defendant oil company on one side and plaintiff and his wife on the other side. On the question as to who must join, the court held that,

"Where a promise is to two persons to pay a single amount, one of them can not maintain an action for his share of the whole, but they must sue jointly."

As to the mode of objecting for such non-joinder, the court, quoting from Tucker's Commentaries,¹² says:

"In all cases of contracts, if it appears upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be, but are not joined in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error; and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it either by plea in abatement, or as a ground of non-suit in the trial upon the plea of the general issue."

The Supreme Court held that the judgment entered for the plaintiff in the lower court be reversed, because of the fatal variance between the declaration and the evidence. Owing to the fact that bringing in the non-joined party by way of amendment would have created a new and different cause of action, the case was not remanded for a new trial but the action was summarily dismissed. The dismissal of the action is virtually an involuntary non-suit in the Supreme Court, and in this respect differs from the usual West Virginia practice.¹³ Of course, the only remedy for the plaintiff was to sue out a new writ. However harsh the consequences of the conclusion reached, it must be conceded that no amendment for the purpose of curing the non-joinder in this case was proper under strict common-law principles. It is fundamental

¹¹ 63 W. Va. 260, 264, 59 S. E. 1082 (1907).

¹² Vol. 2, ed. 1837, 210.

¹³ See note 10, *supra*. The regular practice would have been to remand the case to the lower court for further proceedings. There the plaintiff could have taken a voluntary non-suit. If he had merely neglected to proceed to trial when the case was remanded, his cause would have been discontinued under the Code, ch. 125, § 6. On the other hand, if he had proceeded to a second trial, since he could not have amended his declaration, he would have most certainly suffered a directed verdict against him. The West Virginia cases, however, are not in accord as to when a case will be remanded when a verdict is set aside in the Supreme Court. See *Ruffner v. Dutchess Ins. Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924 (1906); *Soward v. Car Co.*, 66 W. Va. 266, 66 S. E. 329 (1909); *Weeks v. Railway Co.*, 68 W. Va. 284, 69 S. E. 805 (1910).

in the law of amendments that a declaration can not be amended so as to change the cause of action. It would seem obvious that an action based upon a promise from A to B involves a different cause of action from one based upon a promise from A to B and C.

The necessity for the joinder as plaintiffs of all parties in joint interest is again asserted in *Hatfield v. Cabell County Court*,¹⁴ although the case is really decided upon the principle that payment to one of the joint promisees was payment and a discharge as to all. On the same principle, it would seem that a part-payment to one strictly ought to operate only as a joint part-payment and partial discharge as to all. However, in *Martin v. Reiniger*,¹⁵ it was held that, where the obligor pays to one of two joint obligees his share of the common debt, such payment effects a severance whereby the other obligee may sue alone for the share due him under the contract. One who obtains a share in the obligee's interest after the contract is made, of course, need not be joined,¹⁶ for at common law an assignee can sue only in the name of the assignor.¹⁷

It would seem that chapter 125, section 58, of the West Virginia Code, providing that,

"Whenever in any case a complete determination of the controversy can not be had without the presence of other parties, the court may cause them to be made parties to the action or suit by amendment,"

would give the court authority to cure non-joinder of contract plaintiffs by amendment, but no instance is noted where a litigant invoked the aid of the statute for such a purpose.¹⁸ Hence it may safely be deduced from the authorities discussed that the strict common-law procedure with reference to non-joinder of plaintiffs in contract actions remains in full force and effect in West Virginia.¹⁹

¹⁴ 75 W. Va. 595, 84 S. E. 335 (1915).

¹⁵ 74 W. Va. 439, 82 S. E. 221 (1914).

¹⁶ *Sims v. Carpenter, Frazier & Co.*, 68 W. Va. 223, 69 S. E. 794 (1910).

¹⁷ *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584 (1895); *Miller v. Starcher*, 86 W. Va. 90, 102 S. E. 809 (1920). The WEST VIRGINIA CODE, c. 99, § 14, allowing the action to be brought in the name of the assignee, in certain instances, does not prohibit suit in the name of the assignor as at common law. See same cases.

¹⁸ See *infra* where this statute is discussed in connection with non-joinder and misjoinder of contract defendants.

¹⁹ The terms of the WEST VIRGINIA CODE, c. 134, § 3, would seem to be sufficient to cure a non-joinder or a misjoinder of parties apparent on the face of the declaration, unless advantage should be taken of the defect in the first instance by demurrer. However, no cases are noted where the court was asked to apply the statute to joinder of parties, and, under the comparatively strict construction which the court has in general placed upon this statute, it is doubtful whether it would render any aid in this respect. A mere misjoinder of actions, in the absence of a demurrer, is cured by the statute. *Malsby v. Lanark Co.*, 55 W. Va. 484, 47 S. E. 358 (1904);

In Virginia, however, in the Code of 1919, the common-law consequences of non-joinder and misjoinder of parties are practically abolished. This statute,²⁰ enacted for the first time in 1919, and largely conforming to the English and New Jersey practice acts, provides as follows:

"No action or suit shall abate or be defeated by the non-joinder or misjoinder of parties, plaintiff or defendant, but whenever such non-joinder or misjoinder shall be made to appear by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require; but such new party shall not be added unless it shall be made to appear that he is a resident of this state and the place of such residence be stated with convenient certainty, nor shall he be added if it shall appear that by reason of Chapter 232 (Statute of Frauds) or Chapter 238 (Statute of Limitations) the action could not be maintained against him."

MISJOINDER OF PARTIES PLAINTIFF IN ACTION EX CONTRACTU.

It has already been noted²¹ that several promisees must sue separately and that there can not be joint and several promises. Only persons having a joint interest under the contract may be joined. Objection to a misjoinder, if apparent on the face of the declaration, may properly be raised by demurrer at common law, and likewise is fatal on motion in arrest of judgment or on writ of error.²² If the misjoinder is not apparent on the face of the declaration, the objection may be raised under the general issue,²³ by a motion for a non-suit or a directed verdict. In other words, the practical effect of a misjoinder of contract plaintiffs, on principles already discussed, is the same as that of a non-joinder.

Only one instance is noted where the question of misjoinder of contract plaintiffs has come before the West Virginia Supreme Court of Appeals. In *Pollack v. House and Herman*,²⁴ a surviving

Norfolk & Western R. Co. v. Wysor, 82 Va. 250 (1886). Likewise, objection to an ordinary variance between the declaration and the proof must be taken at the trial, or else it is waived. Shenandoah Valley R. Co. v. Moose, 83 Va. 827, 3 S. E. 796 (1887); Bertha Zinc Co. v. Martin's Admr., 93 Va. 791, 22 S. E. 869 (1895); Long v. Campbell, 37 W. Va. 665, 17 S. E. 197 (1893); Long v. Pocahontas Consolidated Collieries Co., 83 W. Va. 380, 98 S. E. 424 (1919). But it will be noted that in all these cases the variance was of such a nature that it properly could have been cured by an amendment of the declaration. At least in those instances where the non-joinder or the misjoinder can not be cured by amendment, there are strong reasons to believe that the defect would not be waived by failure to demur.

²⁰ VA. CODE, 1919, § 6102.

²¹ Notes 3 and 4, *supra*.

²² 31 Cyc. 294; 15 ENCYC. PL. & PRAC., 580-581.

²³ *Starrett v. Gault*, 165 Ill. 99, 46 N. E. 220 (1896); 31 Cyc. 691.

²⁴ 84 W. Va. 421, 100 S. E. 275 (1919).

lessor and the representative of a deceased co-lessor improperly joined in an action for the recovery of rent. A demurrer to the declaration was sustained by the trial court, partly on the ground of such misjoinder. When the demurrer was sustained, the case was immediately certified to the Supreme Court, where the judgment of the lower court as to such misjoinder was affirmed. The Supreme Court refused to decide whether an amendment as to the misjoinder was proper or whether the action should be dismissed on the ground that the declaration was incurably bad, holding that it was without jurisdiction to pass upon this question until the lower court had acted. It is believed, however, that, under the authority of *Sandusky v. Oil Company*,²⁵ to permit an amendment by way of dismissing the misjoined party would be to create a new cause of action, and hence that the only proper course to pursue in the lower court was to take a non-suit and sue out a new writ. If *A v. B* is a different cause of action from *A v. B and C*, then certainly *A and B v. C* is a different cause of action from *A v. C*. It will be recalled that in the *Sandusky Case* the Supreme Court took cognizance of the fact that a non-joinder of a contract plaintiff could not be cured by amendment, and hence summarily dismissed the action, although the non-joinder did not appear on the face of the pleadings and was not raised on demurrer. It is a little difficult to see why the Supreme Court could not, with even more propriety, have determined in the *Pollack Case*, where the question arose on demurrer, whether the declaration was amendable, instead of remanding this question to the lower court.

The *Pollack Case* is authority to the effect that a misjoinder of contract plaintiffs is ground for demurrer to the declaration in West Virginia. Although other phases of the question do not seem to have come up for adjudication, it may safely be assumed, in the absence of any remedial statute, that the consequences of misjoinder of contract plaintiffs in West Virginia are those which prevail under the common law.

In Virginia, even prior to the radical revision of 1919, a statute had been enacted which practically abolished the common-law consequences of misjoinder of parties. This statute,²⁶ enacted in 1895-6, reads as follows:

“Wherever it shall appear in any action at law or suit in equity heretofore or hereafter instituted, by the pleadings or otherwise that there has been a misjoinder of parties, plaintiff

²⁵ Note 11, *supra*.

²⁶ VA. CODE 1904, § 3258a.

or defendant, the court may order the action or suit to abate as to any party improperly joined and to proceed by or against the others as if such misjoinder had not been made, and the court may make such provision as to costs and continuances as may be just."

The Virginia Supreme Court, construing this statute, has held that a misjoinder of plaintiffs is no longer a ground for demurrer, and that the word "may" in the act means "must."²⁷ The provisions of this act are now covered by section 6102 of the Virginia Code of 1919, already quoted, which applies to non-joinder as well as misjoinder. There are no equivalent statutes in West Virginia.

NON-JOINDER OF PARTIES DEFENDANT IN ACTION EX CONTRACTU.

At common law, Dicey states the substantive rule to be that "where several persons are jointly liable on a contract, they must all be sued in an action for the breach thereof, *i. e.* joint contractors must be sued jointly."²⁸ Where the obligation is joint and several, all the obligors must be joined or each must be sued severally.²⁹

Where it is apparent on the face of the declaration that a co-contractor has not been joined as defendant and is alive and within the jurisdiction, the cases are in accord that a general demurrer will lie at common law because the declaration does not state a cause of action against the defendant or defendants sued, but only against a distinct group of persons.³⁰ Where it does not appear on the face of the declaration that the non-joined party is alive, it has been held that the objection can only be raised by a special demurrer.³¹ In other words, where the declaration is silent as to whether the party is dead or alive, a special demurrer is necessary, the defect being regarded as merely one of form.

Where the non-joinder of a co-contractor as defendant is not apparent on the face of the declaration, the defense at common law originally was asserted upon a traverse to the declaration, ordinarily the general issue, the result being a non-suit upon the production of evidence showing the non-joinder; but it was later decided that the objection must be taken by a plea in abatement.³² Subsequently, the Statute 3 & 4 William IV provided that a plea in abatement

²⁷ *Lee & Wife v. Mutual Reserve Fund Co.*, 97 Va. 160, 33 S. E. 556 (1899).

²⁸ DICEY, *PARTIES*, Rule 49.

²⁹ *Idem*, Rule 50.

³⁰ AMES, *CASES ON PLEADING*, ed. 1905, 140.

³¹ *Burgess v. Abbott*, 6 Hill 135 (N. Y. 1843).

³² AMES, *CASES ON PLEADING*, ed. 1905, 142; SUNDERLAND, *CASES ON COMMON LAW PLEADING*, 806.

for non-joinder of other defendants should be accompanied by an affidavit stating the residence in England of the omitted defendant,³³ the practical effect of which was to prevent the resident debtor from objecting to the non-joinder of his co-debtor unless the latter resided within the jurisdiction. The general common-law rule in the United States is that, where the non-joinder of defendants is not apparent on the face of the declaration, objection must be raised by a plea in abatement alleging that the persons not joined are living and resident within the jurisdiction of the court.

The question of non-joinder of contract defendants came up for discussion in many of the early Virginia cases, a number of which are binding authority in West Virginia. The earliest case touching upon the question seems to be *Brown v. Belches*,³⁴ where it is said that, where less than all the partners are sued, those who have not been joined can plead in abatement, and that judgment will be entered against them if they do not discover by a plea in abatement who the other parties are.

In *Leftwich v. Berkely*,³⁵ it was held, in an action on a sheriff's joint and several bond, that each obligor must be sued singly or else that all must be sued together. Since more than one but less than all were sued, the judgment was reversed. There was no demurrer and an issue was tried by a jury on a plea of conditions performed. The non-joinder, however, appeared on the face of the declaration and the objection was heard on a writ of error, the court thus in effect holding that the defect was not waived by failure to demur nor cured by verdict. Doubtless, the defendants could have demurred successfully in the first instance. In *Newman v. Graham*,³⁶ it was held that, in an action of debt against one obligor only, if the declaration describes the bond as joint and does not state the other obligor to be dead, it is a fatal error, though not pleaded in abatement, and is not cured by verdict. Judgment was entered for the defendant. In this case, clearly the defendant could have demurred.

It will be noted that in these cases a defendant is permitted to object to a non-joinder on a writ of error, and of course would be permitted to do so on demurrer, where the declaration merely fails to show that the absent party is dead but does not affirmatively

³³ 1 CHITTY, PLEADING, 46.

³⁴ 1 Wash. 9 (1791). A similar decision is reached in *Barnett v. Watson*, 1 Wash. 372 (1794).

³⁵ 1 Hen. & Munf. 61 (1806). The same was held in *Newell v. Wood*, 1 Munf. 555 (1810).

³⁶ 3 Munf. 187 (1812). *Watson's Executor v. Lynch's Heirs*, 4 Munf. 95 (1813), is in accord.

show that he is living. This is contrary to the common-law rule announced in *Burgess v. Abbott*³⁷ to the effect that only a special demurrer is proper unless the declaration shows affirmatively that the absent party is living. The latter decision criticises the Virginia decisions in this respect, indicating that they are based on English cases involving a *scire facias* to revive a judgment, which are not in point. However, it would seem that the common-law presumption that a person is presumed to be living until he is shown to be dead ought to prevail, and that on this presumption the Virginia decisions are correct. Otherwise, since objections to formal defects requiring a special demurrer in the Virginias are abolished, a defendant would be unable to demur at all in such a situation.

In *Walmsley v. Lindenberger*,³⁸ the plaintiff sued one only of two partners, alleging in his declaration that the partner whom he did not sue was an infant. The defendant demurred. The court held that, because the infant partner's contract was not void but only voidable, he also should have been sued, and, therefore, the demurrer should be sustained.

On the question whether objection to a non-joinder not apparent on the face of the declaration can be raised under a plea in bar, the Virginia decisions have consistently followed the later common-law rule. In *Prunty v. Mitchell and Cobbs*,³⁹ upon a plea of *non assumpsit*, the court instructed the jury that if they believed from the evidence that the contract, for the breach of which plaintiff sued, was made with a partnership firm, of which Finney was a member, in addition to the two defendants, they should find for the defendants. The appellate court says:

"In the case of defendants, if a party be omitted who is liable to be sued jointly with the defendants, the objection can be taken only by plea in abatement, verified by affidavit. 1 Chitty on Pleading, p. 53, 16th A. Ed.

"Mr. Robinson says: 'Pleas in abatement on account of all contracting parties not being sued, were first made necessary in the time of Lord Mansfield. It was then adjudged (in 1770) that the defendant must say in his plea who the partners are, and that if he does not plead the matter in abatement, the objection is waived.' 5 Rob. Prac. p. 78. He cites *Rice v. Shute*, 5 Burr. 2613; 2 Wm. Bl. 695; *Abbott v. Smith*, 2 Wm. Bl. 947; Buller, J., in *Reese v. Abbott*, Cowp. 832, and *Sheppard v. Baillie*, 6 T. R. 329.

³⁷ Note 31, *supra*.

³⁸ 2 Rand. 478, 482 (1824).

³⁹ 76 Va. 169, 170-171 (1882).

"Prior to *Rice v. Shute*, it appears from the same writer that the defence of 'other joint contractors not sued', would avail upon *non-assumpsit* if the defendant showed, in an action on a sole contract, that he had promised jointly with another, his issue was regarded as proved. If that doctrine prevailed now, the instructions given by the court in this case could be maintained. The cases which held that doctrine, it seems, were decided after the action of *assumpsit*, was substituted for the action of debt in cases of simple contract, and before the plea in abatement had been introduced for that form of action. For De Gray, C. J., says: 'Proof that another also contracted does not prove that I did not contract.' And he observes, this doctrine is as old as the year books. And most of the cases to which he refers, Sir James Mansfield remarks, are cases of debt on simple contract, which was the usual mode of declaring previous to Slade's Case. Cited 3 Rob. Prac., ch. 73, §1, p. 389.

"But since *Rice v. Shute* and *Abbott v. Smith*, defendants, can avail themselves of the objection only by plea in abatement. Lord Ellenborough, C. J., referring to these cases in 43 Geo. 3 (1802) said: 'That since these cases nobody can entertain a doubt that the objection was available not only by plea in abatement, but that it was available in that way only, and can not be taken advantage of on the general issue.' Mr. Robinson cites numerous cases, English and American, in support of this doctrine.

"And in his old book on practice, vol. 1. p. 163, he says when one partner is sued alone upon a partnership transaction, the defendant can only take advantage of it by pleading in abatement and pointing out the other partners. His failure to plead in abatement is a waiver of the objection. He cannot, after pleading to issue, give evidence at the trial that there was another partner not joined in the action. And this rule holds, even though it should appear by the evidence that the plaintiff knew of the partnership."

Having thus held that the instruction was wrong, the Supreme Court remanded the case for further proceedings.

The same question arose again in *Wilson and Griffith v. McCormick*,⁴⁰ where the court says:

"The question is thus presented, whether the non-joinder of a co-contractor as a defendant can be taken advantage of under the general issue in an action of *assumpsit*, on the ground of a variance between the *allegata* and the *probata*, when the omission of the co-contractor does not appear on the face of the declaration. The circuit court by its instruction held, in effect, that it can; but nothing is better settled than that

⁴⁰ 86 Va. 995, 11 S. E. 976 (1890).

it cannot. The precise question was raised in *Prunty v. Mitchell*, 76 Va. 169, which was an action on a partnership transaction, and in which case it was held that the objection can be taken only by plea in abatement verified by affidavit. The failure of the defendant to plead in abatement, said the court, was a waiver of the objection, and this rule holds in such cases, it was added, although it should appear by the evidence that the plaintiff knew of the partnership.

“This has always been the prevailing doctrine, says Professor Minor, in respect to the action of covenant and of debt, even on simple contracts; but from the time that, under the sanction of *Slade's case*, 4 Co., 93a, the action of trespass on the case in *assumpsit* came into common use as a concurrent remedy with debt on promises to pay money, not under seal, it was long the practice in that action to prove the non-joinder of the co-contractor at the trial, upon the general issue of *non-assumpsit*, on the notion that a variance was thereby established between the declaration and the proofs. This practise, however, under the influence of Lord Mansfield, was abandoned in *Rice v. Shute*, Burr., 2611, a case which was followed by *Abbott v. Smith*, 2 Wm. Bl., 947, and has ever since prevailed in England and America.’ 4 Min. Inst. (2d ed.), marg., p. 630.”

It has already been noted that the objection, under the early common-law decisions, could be raised under the general issue, on the theory that there was a variance between the declaration and the proof. The later decisions hold that there is no such variance. Without entering into an extended comparison, it may be suggested that, if it is conceded that there is a variance where contract plaintiffs are non-joined or misjoined, it is difficult to see why there is not, on the same principles, a variance where contract defendants are non-joined. True, when it is shown that A and B promised, it is shown that A promised; but it can also be said that X promised Y when it is proved that he promised Y and Z. Seemingly, it is in order to get around this difficulty of a variance that the Virginia decisions have said it will be presumed that the non-joined party did not execute the contract. But if this presumption is sound, a demurrer ought not to be sustained when the non-joinder is apparent on the face of the declaration. The suggestion sometimes made that a non-joinder of defendants lies more peculiarly within the knowledge of the defendant, and that it is only fair to the plaintiff to compel the defendant to raise the objection as early as possible by plea in abatement, does not remove the inconsistency, even if true in the majority of cases. There is nevertheless a variance. Moreover, if notice to the parties of the existence of the ab-

sent party is the important thing, and if the defendant is to be compelled to take advantage of the defect at the earliest possible stage of the proceedings, why permit him, when the non-joinder is apparent on the face of the declaration, to raise the objection on a writ of error when he has failed to demur in the lower court? These statements are made with the purpose of showing what is believed to be the inconsistency of the later common-law rule, but with a full realization that the rule is now firmly and universally established, and it likely must be conceded that it has achieved justice in its inconsistency.

The West Virginia Supreme Court of Appeals recognizes in full the common-law rules as to the necessity of joining all joint obligors or promisors in contract actions. In *Hoffman v. Bircher*,⁴¹ the court says:

"It is a well established rule of the common law, that the plaintiff upon a joint contract, must sue all the joint contractors, and bring them before the court, and mature his cause against all, or if any should not be brought before the court he must proceed to outlawry against such defendants before he could obtain judgment against any of them; and that he must recover a joint judgment against all the defendants, except such as may be discharged from liability by a defense personal to themselves, such as infancy, bankruptcy or any other matters which do not go to the foundation of the action, or against none of them; and this result followed in every joint action, whether brought upon a joint, or upon a joint and several obligation, for the plaintiff having elected to treat it as joint, he took his joint remedy subject to all the incidents of a joint contract. . . .

"It is a rule equally well settled that where the contract was several, and not joint, each of the persons severally bound, could be sued separately; and so where the contract was *several* as well as joint, the plaintiff was at liberty to treat it as a several contract, and in that case also, he could sue the parties so bound severally, and in both cases, recover against them separate judgments."

The early Virginia cases already discussed may be accepted as establishing in West Virginia the common-law rule to the effect that a non-joinder of contract defendants, when apparent on the face of the declaration, may be objected to by demurrer, motion in arrest of judgment, or on a writ of error. The question seems to have received slight consideration by the West Virginia court. It was first

⁴¹ 22 W. Va. 537, 542 (1883). In accord, see *State ex rel. Kioak Bros. v. Corvin*, 51 W. Va. 19, 27, 41 S. E. 211 (1902).

considered in *Reynolds v. Hurst*,⁴² but what the court says is by way of *dicta*, since the action was against one of five joint and several obligors, and therefore did not present a case of non-joinder. On page 654, the court says:

“If at common law a plaintiff sued upon a joint obligation made by two, whether this appeared on the face of the declaration or when the obligation was offered in evidence, the defendant could not take advantage of the fact by demurrer or motion to exclude; his only remedy was by way of plea in abatement, in which he must have alleged the joint character of the obligation, and that the party not sued was alive. In no other way could he take advantage of the non-joinder.”

On page 655, the court says:

“I think it is conclusive from these authorities, that no advantage whatever can be taken for non-joinder of co-obligors except by a plea in abatement.”

Since it would seem that the court is in error in stating that non-joinder apparent on the face of the declaration can only be reached by a plea in abatement, it is worth while to note the authorities which the court cites as making its statement “conclusive”. The chief authority cited is Williams’ notes to *Cabell v. Vaughn*,⁴³ a decision in which the court was not considering a case where the non-joinder was apparent on the face of the declaration. The West Virginia court quotes at some length from Serjeant Williams’ note, but stops short just before the following sentence, which shows the incorrectness of the statement that a plea in abatement is necessary where the non-joinder is apparent:

“If it appears on the face of the declaration, or any other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, . . . the court will arrest the judgment; because the plaintiff himself shows that another ought to be joined, and it would be absurd to compel the defendant to plead facts which are already admitted.”

The other authorities equally fail to sustain the statement of the court as to a plea in abatement being necessary where the non-joinder of a joint co-obligor is apparent on the face of the declaration. Hence it would seem that the early Virginia decisions should have more weight in West Virginia than these *dicta*, which are not supported by the authorities cited to sustain them.

⁴² 18 W. Va. 648 (1881).

⁴³ 1 Saunders 291.

Where the non-joinder is not apparent on the face of the declaration, the West Virginia court has consistently followed the later common-law rule and refused to notice the non-joinder unless pleaded in abatement.⁴⁴ In *Scott v. Newell*,⁴⁵ apparently the latest case raising the question of non-joinder of contract defendants, the court says:

"If there was a non-joinder it does not appear from the declaration, and it could only have been taken advantage of by a plea in abatement, and none was interposed; and before such a plea could avail it would have to show that the person who ought to have been joined is a resident of the state."

In West Virginia, not only must the non-joinder be pleaded in abatement, but even the right to plead in abatement is limited by statute:⁴⁶

"No plea in abatement, for the non-joinder of any person as a co-defendant, shall be allowed in any action, unless it is stated in the plea that such person is a resident of the state, and unless the place of residence of such person be stated with convenient certainty in an affidavit verifying the plea."

The effect of this statute is, of course, that it is not necessary to join joint obligors or promisors who are not residents of the state. In some of the decisions, *e. g.*, *Rutter v. Sullivan*,⁴⁷ there seems to prevail an indefinite idea that this statute prescribes a plea in abatement as the only method of objecting to a non-joinder of defendants. Possibly this conception is responsible for the unwarranted *dicta* in *Reynolds v. Hurst*. However, a careful reading of the statute will show that it does not say that a plea in abatement shall be used, but merely says what a plea in abatement must contain if it is used. The statute evidently undertakes to leave it to the common law to say when a plea in abatement is appropriate or must be used.

The West Virginia statute⁴⁸ further provides:

"If a defendant plead in abatement that any other person

⁴⁴ *Rutter v. Sullivan*, 25 W. Va. 427 (1885); *McDonald v. Cole*, 46 W. Va. 186, 189, 32 S. E. 1033 (1899); *Scott v. Newell*, 69 W. Va. 118, 122, 70 S. E. 1092 (1911).

⁴⁵ See previous note.

⁴⁶ W. VA. CODE, c. 125, § 17. It will be noted at once that this statute is based on the STAT. 3 & 4 WM. IV. ch. 42, s. 8, already mentioned. It was taken into the WEST VIRGINIA CODE from the Virginia Code. See VA. CODE, 1860, c. 171, § 20; 1849, c. 171, § 20.

⁴⁷ Note 44, *supra*.

⁴⁸ W. VA. CODE, c. 125, § 18. This section is taken from the VIRGINIA CODE, c. 171, § 21; CODE, 1849, c. 171, § 21, and is based on STAT. 9 GEO. IV, c. 14, § 2. Chapters 98 and 104, referred to in section 18, are the Statute of Frauds and the Statute of Limitations, respectively.

ought to be jointly sued, and at the trial of an issue joined on such plea, it appear that the action could not, by reason of chapter ninety-eight, or chapter one hundred and four of this Code, be maintained against such other persons, or any of them, such issue shall be found against the defendant so pleading.”

The section of the Code immediately following reads as follows:⁴⁹

“After such plea in abatement, the plaintiff, without proceeding to trial upon an issue thereon, may amend his declaration, and make the persons named in such plea as joint contractors, defendants in the case with the original defendants, and cause process to be served upon the new defendants; and, if it appear by the subsequent pleadings in the action, or at the trial thereof, that all the original defendants are liable, but that one or more of the other persons named in such plea are not liable, the plaintiff shall be entitled to judgment, or to verdict and judgment, as the case may be, against the defendants who appear liable; and such as are not liable shall have judgment, and recover costs as against the plaintiff, who shall be allowed the same as costs against the defendants who so pleaded.”

In *Carlon v. Ruffner*,⁵⁰ the court held that sections 18 and 19 are applicable in the case of a plea in abatement *puis darrein continuance* for non-joinder of defendants. It was also held that where the plaintiff, after issue joined, dismissed as to certain defendants whom plaintiff considered misjoined, the remaining defendants should plead in abatement *puis darrein continuance* in order to raise the defense of non-joinder of those as to whom the action was dismissed.

It is interesting to note here an instance⁵¹ where a defendant, having failed to plead a non-joinder of defendants in abatement, undertook at the trial of the case to have them made defendants by virtue of section 58, chapter 125, of the West Virginia Code. This section, already discussed under non-joinder of contract plaintiffs, reads as follows:

“Whenever in any case a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be made parties to the action or suit by amendment.”

⁴⁹ W. VA. CODE, c. 125, § 19. This section is taken from the VIRGINIA CODE, 1860, c. 171, § 22; CODE, 1849, c. 171, § 22. It is based on STAT. 3 & 4 WM. IV., c. 42, § 8.

⁵⁰ 12 W. VA. 297, 308 (1877).

⁵¹ *Rutter v. Sullivan*, 25 W. VA. 427 (1885).

The court, refusing the request of the defendant to make additional parties, says:

"It is a familiar rule of construction, that all of the sections of a statute must be read together and harmonized, if possible. It is difficult to understand precisely what is meant by this section, which makes its first appearance in the Code of 1868. To give it the construction contended for by counsel for the appellees would be, to hold section fourteen to have no force or effect whatever, because the sections are in hostility to each other; and it would be to hold, that said fifty-eighth section not only destroys section seventeen, but that it also entirely destroys a long established rule in pleading."

It must be said, borrowing the language of the court, that it is difficult to understand precisely the application of the court's argument. Section 14 mentioned by the court relates to curing misnomers, and is in absolute harmony with section 58, having the same remedial purpose as the latter section. Apparently, the court looks upon section 17 as confining the defendant to his remedy by plea in abatement. If this were true it might be in conflict with section 58; but it has already been noted that this is not true. As to the argument that the construction asked by the defendant would destroy "a long established rule in pleading", it may be replied that likely that was the very object of the statute. It will be noted that the statute uses the word "action" as well as "suit"; and it is worth noticing that in equity suits the court already had power independently of the statute to admit new parties, and hence that the legislature could have had little purpose in enacting such a statute to be applied to equity suits alone. However, it is possible that the general drift of the court's argument, although based upon poor reasoning, to the effect that the defendant should be confined to his plea in abatement if he desired to make new parties, is sound. One explanation for so confining him is that it would work a surprise upon the plaintiff to compel him to make an amendment at the trial. Moreover, it should be noted that the defendant, not the plaintiff, is asking for the new parties; and that, on the common-law theory that the defendant has waived the non-joinder by failing to plead in abatement, the plaintiff may proceed to judgment without bringing in the non-joined parties. Hence it may be said, in the very language of section 58, that "a complete determination of the controversy" may be had without the addition of new parties.

(Continued in June Issue).